

## FAIR POLITICAL PRACTICES COMMISSION

### Memorandum

**To:** Chairman Randolph, Commissioners Blair, Downey, Karlan, and Knox  
**From:** Natalie Bocanegra, Commission Counsel  
Luisa Menchaca, General Counsel  
**Re:** *In re Roberts* Opinion Request; O-04-093  
**Date:** September 21, 2004

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### I. Summary

On April 22, 2004, David W. Roberts submitted a request for written advice concerning the possible implications of recently chaptered legislation, Assembly Bill 205 (Ch. 421, Stats, 2003).<sup>1</sup> Going into effect on January 1, 2005, Assembly Bill 205 will amend the law relating to domestic partnership. (Attachment 1.) The new law will generally treat domestic partners as married couples by amending the Family Code to provide that registered domestic partners have the same rights and obligations as spouses.

Mr. Roberts sought advice regarding potential conflicts of interest that may arise for him by virtue of his domestic partnership if he is elected to the Solana Beach City Council. On August 31, 2004, Mr. Roberts modified his request to one for an opinion on this matter. Executive Director Mark Krausse issued a letter on September 1, 2004, granting the opinion request.

This staff memorandum, prepared pursuant to regulation 18322, discusses the issues presented by the opinion request.<sup>2</sup> In particular, this memorandum addresses whether the statutory changes made by Assembly Bill 205 impact the duties and responsibilities under the Political Reform Act (“Act”),<sup>3</sup> of a public official who is in a domestic partnership.

**Question Presented:** In light of recent legislation affecting family law should the term “spouse” under the Act now include a domestic partner?

**Commission Options:** Pursuant to section 83112, the Commission may adopt, amend, and rescind rules and regulations to carry out its purposes. Therefore, the Commission has discretion to interpret the term “spouse” for purposes of implementing the Act.

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<sup>1</sup> This bill is known as “The California Domestic Partner Rights and Responsibilities Act of 2003.”

<sup>2</sup> This memorandum will be provided to the members of the Commission, the Attorney General, the Franchise Tax Board, the Secretary of State, the opinion’s requestor and other interested parties two weeks prior to the hearing. (Regulation 18322.) Any interested person may submit memoranda, briefs or other relevant material no later than 5 days prior to the scheduled hearing. (*Id.*) The requestor also may present oral testimony at the hearing on the request. (*Id.*)

<sup>3</sup> All references are to the Government Code unless otherwise noted.

- **Option 1:** Option 1 maintains the status quo by concluding that Assembly Bill 205 does not alter the Commission's past interpretation of this term so that the definition of "spouse" does not include "domestic partner." As discussed below, under this option, economic interests (income, gifts, real property, and investments) of one domestic partner are not disqualifying to the other, nor are they reportable.
- **Option 2:** Under Option 2, the term "spouse" will include domestic partners, as defined by Assembly Bill 205, for purposes of the Act. This means that economic interests of one domestic partner would be disqualifying to the other partner. Gifts to each other would continue not to be disqualifying or reportable.

Staff offers no specific recommendation with regard to these options but has drafted two versions of a possible opinion that can be issued by the Commission at this meeting.

## **II. Facts**

Mr. Roberts is running for the Solana Beach City Council. He and his registered domestic partner own a home in Solana Beach and are jointly responsible for each other's basic living expenses. Mr. Roberts' partner is a part-time salaried property manager for an oceanfront condominium complex in Solana Beach. In December 2003, Mr. Roberts and his partner sold an individual condominium unit where his domestic partner is currently employed as the property manager. He has no other interest in this oceanfront condominium complex.

## **III. Assembly Bill 205 (Goldberg)**

Assembly Bill 205 ("AB 205") extends the rights and duties of marriage to persons registered as domestic partners on and after January 1, 2005. Section 297.5(a) of the bill states:

"Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses." (Section 297.5(a) of the Family Code as amended by Chapter 421, Stats. 2003.)

However, AB 205 does not expressly amend the term "spouse" for purposes of the Family Code. Specifically, this bill does not amend section 308.5 of the Family Code, which states that "[o]nly marriage between a man and a woman is valid or recognized in California." (See Attachment 2.) Section 11 of the Family Code further states:

“A reference to ‘husband’ and ‘wife,’ ‘spouses,’ or ‘married persons,’ or a comparable term, includes persons who are lawfully married to each other and persons who were previously lawfully married to each other, as is appropriate under the circumstances of the particular case.” (See Attachment 3.)

This section was added by the legislature in 1992 in recasting a comprehensive scheme relating to family law, adoption procedures, and the prevention of domestic violence as the Family Code. (Digest, Chapter 162, Stats. 1992.)<sup>4</sup>

Further, AB 205 states that: “[t]his section does not amend or modify any provision of the California Constitution or any provision of any statute that was adopted by initiative.” (Section 297.5(j) of the Family Code as amended by Chapter 421, Stats. 2003.) Since the Political Reform Act was enacted by initiative statute in 1974 as part of Proposition 9, staff does not view AB 205 as altering any provision of the Act.

Moreover, Assembly Bill 205 states that it:

“... does not preclude any state or local agency from exercising its regulatory authority to implement statutes providing rights to, or imposing responsibilities upon, domestic partners.” (Section 297.5(i) of the Family Code as amended by Chapter 421, Stats. 2003.)

#### **IV. Use of the Term “Spouse” within the Act**

AB 205 can implicate the Political Reform Act where the term “spouse” can subject a public official to disqualification or reporting. This can occur where the term “spouse” appears in the Act or where the term “immediate family” appears because that term includes a spouse and dependent children, as defined in section 82029.

The decision to define “spouse” will primarily affect staff’s analysis of whether income of a domestic partner triggers disqualification or reporting. This is because section 82030 defines “income” to include “any community property interest in the income of a spouse.”

Advice pertaining to real property and investments will also be primarily affected. Section 82034 defines “investment” as “... any financial interest in or security issued by a business entity, including but not limited to common stock, preferred stock, rights,

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<sup>4</sup> Prior to this legislation, this scheme was established under various provisions of the Civil Code, Code of Civil Procedure, Evidence Code, and Probate Code, including the Family Law Act, the Uniform Parentage Law, the Domestic Violence Prevention Act, the Uniform Act on Blood Tests to Determine Paternity, the Revised Uniform Reciprocal Enforcement of Support Act of 1968, and the Family Conciliation Court Law. (*Ibid.*)

warrants, options, debt instruments and any partnership or other ownership interest owned directly, indirectly or beneficially by the public official, or other filer, or his or her *immediate family*....” (Emphasis added.)

Also, section 82033 states that “interest in real property” includes “... any leasehold, beneficial or ownership interest or an option to acquire such an interest in real property located in the jurisdiction owned directly, indirectly or beneficially by the public official, or other filer, or his or her *immediate family* if the fair market value of the interest is two thousand dollars (\$2,000) or more....” (Emphasis added.) The additional sections listed in Table 1 and Table 2 below also include either the term “spouse” or “immediate family”:

<b>Table 1</b>		
<b>Section Including “Spouse”</b>	<b>Title</b>	<b>Area of Act</b>
82028	Gift	Definitions (gift exclusion)
82030.5	Earned Income	Definitions (earned income exclusion)
84211	Contents of Campaign Statement	Campaign Disclosure
87460	Loans to Public Officials	Conflict of Interest (Loans)
87461	Loan Terms	Conflict of Interest (Loans)
89511	Campaign Funds Held by Candidates and Committees	Campaign Funds

<b>Table 2</b>		
<b>Section Including “Immediate Family”</b>	<b>Title</b>	<b>Area of Act</b>
82045	Payment to Influence Legislative or Administrative Action	Definitions
84219	Slate Mailer Organization; Semi-Annual Statements	Campaign Disclosure
86111	Activity Expense; Agency Official	Lobbying
87450	Restrictions in Participation of State Officers in Decisions Relating to Contracts	Conflict of Interest (State Contracts)
89513	Use of Campaign Funds for Specific Activities	Campaign Funds
89515	Use of Campaign Funds for Donations and Loans	Campaign Funds
89516	Use of Campaign Funds for Vehicle Expenses	Campaign Funds
89517	Use of Campaign Funds for Real Property, Appliances or Equipment	Campaign Funds
89519	Use of Surplus Campaign Funds	Campaign Funds

## V. PRA Implications

### A. Disqualification.

Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a “financial interest” in a governmental decision within the meaning of the Act, if it is reasonably foreseeable that the governmental decision will have a material financial effect on one or more of the public official’s economic interests. (Section 87103; regulation 18700(a).) The Commission has adopted a standard eight-step analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision. (Regulation 18700(b)(1)-(8).) The conflict-of-interest issue raised by Mr. Roberts concerns the identification of his economic interests, Step 3 of this analysis.

Section 87103 identifies economic interests as defined in the Act.

***Business Entity and Real Property:*** A public official has an economic interest in a business entity in which he or she has an indirect investment. (Section 87103(a); regulation 18703.1(a).) A public official also has an economic interest in real property in which he or she has an indirect interest worth \$2,000 or more. (Section 87103(b); regulation 18703.2.)

An indirect investment or interest includes any investment or interest owned by the spouse of an official or by a member of the official’s immediate family, or by a business entity or trust in which the official, the official’s immediate family, or their agents own directly, indirectly, or beneficially a 10% interest or greater. (Section 87103.) Therefore, economic interests triggering a public official’s disqualification include investments and real property of a public official’s spouse in addition to any business entity or real property owned by a business in which a spouse has a 10% or greater interest. (*Esselstein* Advice Letter, No. I-03-293; Section 87103.)

***Income:*** A public official has an economic interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (section 87103(c); regulation 18703.3).

The definition of income in section 82030 provides that income of an individual also includes a pro rata share of any income of any business entity or trust in which the individual or spouse owns, directly or indirectly or beneficially, a 10% interest or greater. (Section 82030.) Therefore, not only is a spouse’s income a potentially disqualifying economic interest of a public official, but clients of a spouse’s business can be potential sources of disqualification where a spouse owns a 10% or greater interest in the business. (*Stone* Advice Letter, No. I-01-014; *Martin* Advice Letter, No. I-99-144.)

**Gifts:** A public official has an economic interest in any source of gifts to him or her if the gifts aggregate to \$340 or more within 12 months prior to the decision (section 87103(e); regulation 18703.4).

While the Act does provide an express exception to the definition of “gift” for gifts from spouses (section 82028(b)(3)), historically gifts from domestic partners have also been exempt as gifts exchanged in a “bona fide dating relationship.” (*Grigg* Advice Letter, No. I-02-184; *Albuquerque* Advice Letter, No. A-00-120.)

**Personal Financial Effect:** A public official has an economic interest in his or her personal finances, including those of his or her immediate family -- this is the “personal financial effects” rule (section 87103; regulation 18703.5).

## **B. Reporting**

Unless an exception applies, a public official’s community property interest in his or her spouse’s income is reportable, as well as a spouse’s ownership interest in real property and investments held by the spouse or a business owned by the spouse’s interest. The specific reporting requirements are provided by sections 87206 and 87207. (Also see sections 82029, 82030, 82033, and 82034.)

## **C. Possible Effect of AB 205**

**Income:** Currently, the Act does not make reference to any “community property” interest in the income of a “domestic partner.” Therefore, at present, a domestic partner’s income is not an economic interest to a public official. For example, if a domestic partner receives income from a business that appears before the public official, that business is not a disqualifying source of income to the official. Ordinarily, a spouse’s income of \$1,000 or more is disqualifying because we consider half of that income to be attributable to the public official.

The question raised is whether a public official should be deemed to have an economic interest in income that is most likely deemed “community property” under the new domestic partner law. (See sections 299(a)(6) - (7) of the Family Code as amended by Chapter 421, Stats. 2003, for reference to “community property.”) The answer to this question turns on whether the Commission should alter its past treatment of “community property” interests.<sup>5</sup>

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<sup>5</sup> The Commission may adopt, amend and rescind rules and regulations to carry out the purposes and provisions of this title, and to govern procedures of the Commission. (Section 83112.) In doing so, the Commission should liberally construe the Act (section 81003) to accomplish its purposes, several of which include: (a) Receipts and expenditures in election campaigns should be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited; (b) The activities of lobbyists should be regulated and their finances disclosed in order that improper influences will not be directed at public officials; (c) Assets and income of public officials which may be materially affected by their official actions should be disclosed and in appropriate circumstances the officials should be disqualified from acting in order that conflicts of interest may be avoided. (Sections 81002(a) – (c).)

Traditionally, the Commission has considered and applied family law concepts when analyzing community property issues. (See *Morales* Advice Letter, No. A-99-246(a); *Hackard* Advice Letter, No. A-84-070; *In the Matter of Art Torres*, 2 FPPC Ops. 31.) This approach has been used when analyzing both disclosure and disqualification obligations under the Act. (*Grigg*, *supra*; *Moen* Advice Letter, No. A-01-078.)

However, the family law “community property” rule has been applied only in the context of a marital relationship. (*Ibid.*) For example, in the *Moen* letter, Commission staff considered Family Code section 299.5(d) which stated that a domestic partnership did not create community property or quasi-community property. (Assembly Bill 205, when in effect, will repeal Family Code section 299.5 and provide that registered domestic partners have the same rights and obligations as spouses under the law.)

The Commission has, on occasion, departed from existing family law when making legal determinations for purposes of the Act. (*Torres*, *supra*.) In the *Torres* Opinion, the Commission analyzed, in part, whether wedding gifts addressed to and received by Assemblyman Torres’ wife prior to the marriage were her separate property and therefore not reportable by Assemblyman Torres. After examining applicable family law, the Commission stated:

“Rather than depend on the theoretical nuances of community property law to determine ownership of wedding gifts, we believe that the interests of disclosure under the Political Reform Act can best be served by adopting a test similar to that set forth in *Avnet*. Regardless of whether or not the gift is received by the bride prior to the marriage, wedding gifts benefit both spouses and should be subject to disclosure unless peculiarly adaptable to the personal use of one spouse or specifically intended for the use of one spouse. Accordingly, Assemblyman Torres should disclose receipt of wedding gifts according to the guidelines which we set forth in this opinion.”

This opinion illustrates both the Commission’s authority and willingness to consider (and apply or modify) family concepts in carrying out the purposes of the Act. Even so, the Commission has not defined the term “community property” or “spouse” either by advice letter, opinion, or regulation.

**Investments:** As discussed above, section 82034, defining “spouse,” does not currently include a domestic partner so the existing rule is that a public official in a domestic partnership does not have an economic interest in the investments of his or her domestic partner. However, if the Commission determines that “spouse” and therefore “immediate family” includes a domestic partner, a public official in a domestic

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partnership would then have an economic interest in any investment of his or her domestic partner.<sup>6</sup>

**Interests in Real Property:** Here again, a public official does not currently have an economic interest in real property held by his or her domestic partner. However, if the Commission modifies its interpretation of the term “spouse” (and “immediate family”) to include a domestic partner, the public official will also have an economic interest in any real property owned by his or her domestic partner.

**Personal Financial Effect:** Finally, a public official also has an interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is known as the “personal financial effects” rule. (Section 87103; regulation 18703.5.) At present, a public official does not have a personal financial effect in his or her domestic partner’s personal expenses, income, assets, or liabilities except to the extent that a personal financial effect on his or her domestic partner possibly translates into a material personal financial effect on the official due to other financial arrangements.

In contrast, if “spouse” and “immediate family” were interpreted by the Commission to include a domestic partner, a public official with a domestic partner would always have an economic interest in the personal expenses, income, assets, or liabilities of that partner.

## **VI. Assembly Bill 205: Commission Options**

The staff has prepared two possible opinions for the Commission to consider.

**Option 1:** Maintain the status quo by concluding that Assembly Bill 205 does not alter the Commission’s past interpretation of this term so that the definition of “spouse” does not include “domestic partner.” (Attachment 4.)

**Option 2:** Modify the definition of “spouse” for purposes of the Act based on legislative changes in family law made by AB 205. (Attachment 5.)

As mentioned, the Act expressly provides that “income” includes “any community property interest in the income of a *spouse*.” (Section 82030. Emphasis added.) However, as discussed, the Act does not define this term nor does it specify the circumstances under which an official has a community property interest. If the Commission were to continue to apply family law concepts when analyzing community property issues, the Commission may wish to give consideration to AB 205’s purpose of extending the rights and obligations of spouses to domestic partners. (Section 297.5 of

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<sup>6</sup> It should be noted that while separated spouses have not been considered to have “community property” interests in each other’s income, we have advised that they continue to have real property and investment interests until the spousal relationship is legally dissolved. (*Mattas* Advice Letter, No. I-01-152.) This different result stems from the inclusion of the term “community property” in the definition of income in section 82030, but not elsewhere in the Act.



the Family Code.) On the other hand, the purposes of the Act are distinct from the Family Code, and it may be that no change to longstanding Commission advice is warranted.

If the Commission wishes to implement the aim of AB 205 for purposes of the Act, the conclusion would be that the term “spouse” now includes domestic partners for purposes of the Act. Under this interpretation, a public official such as Mr. Roberts will have an economic interest in the source of his domestic partner’s income when AB 205 goes into effect. This would be consistent with AB 205’s purpose of granting virtually all incidents of marriage (i.e., both rights *and* responsibilities). If this analysis is employed, it will also affect current advice regarding campaign disclosure, lobbying, and campaign funds.

**Staff Recommendation:** Staff offers no specific recommendation with regard to these options but emphasizes that the Commission has the authority to define “spouse” (and “immediate family”) in whatever manner it determines best carries out the purposes of the Act.

### **Attachments**

Attachment 1 - Assembly Bill 205

Attachment 2 - Family Code sections 300 – 310

Attachment 3 - Family Code sections 1 - 13

Attachment 4 - Option 1

Attachment 5 - Option 2